IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, *Commissioner of Education of the State of New York*, et al.,

Appellants,

v.

JEAN-MARIE MAUCLET,

Appellee,

and

EWALD B. NYQUIST, *Commissioner of Education of the State of New York*, et al.,

Appellants,

v.

ALAN RABINOVITCH,

Appellee.

MOTION TO AFFIRM ON BEHALF OF ALAN RABINOVITCH

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Pursuant to Rules 16(c) and (d) of the Rules of this Court, plaintiff-appellee Alan Rabinovitch moves that the judgment of the district court be affirmed insofar as it

declared § 661(3) of the New York Education Law unconstitutional and enjoined its enforcement.[1]

Jurisdiction

The case was heard by a three-judge district court pursuant to 28 U.S.C. § 2281. The judgment of the District Court for the Eastern District of New York pertaining to the *Rabinovitch* case (dated March 26, 1976) was entered by the Clerk of said court on March 29, 1976. Appellants' notice of appeal was filed on May 28, 1976. Jurisdiction of this appeal as it relates to appellee Rabinovitch is conferred by 28 U.S.C. § 1253.[2]

Question Presented

Whether the district court erred in unanimously concluding that Section 661(3) of the New York Education Law was unconstitutional.

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[1] Appellee Rabinovitch also sought a judgment against appellant New York State Higher Education Services Corporation, awarding him withheld scholarship and tuition assistance funds. The district court denied such relief, citing *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Mr. Rabinovitch has appealed to this Court from that aspect of the decision below. His appeal is pending under docket number 75-1809.

[2] The *Rabinovitch* case was heard together with a similar case filed in the Western District of New York, *Mauclet* v. *Nyquist*, Civ. 75-73. The cases were decided by a single opinion. However, the judgment of the District Court for the Western District of New York in the *Mauclet* case was entered on February 11, 1976. (It is not reprinted in the Jurisdictionaal Statement.) The judgment of the Eastern District was not entered until March 29, 1976. A notice of appeal was filed by appellants in the Western District on March 12, 1976; in the Eastern District the notice of appeal was filed on May 28, 1976. Accordingly, it appears that appellants failed to docket their appeal from the *Mauclet* judgment in a timely fashion. Rules of the Supreme Court 13. Jurisdiction nonetheless lies because the appeal in the *Rabinovitch* case is timely.

Statement

The facts are undisputed. They are set forth in the Jurisdictional Statement (4-7), in the opinion of the court below (J.S. 14a-15a; 406 F. Supp. 1233, 1234) and in the Jurisdictional Statement filed on behalf of Mr. Rabinovitch in No. 75-1809 at pages 4-7.

Argument

1. In June of this year the Court reaffirmed the principle that "state classifications based on alienage are subject to 'strict judicial scrutiny.'" *Examining Board* v. *Flores de Otero*, —— U.S. ——, 96 S. Ct. 2264, 2281, 49 L.Ed.2d 65, 85 (1976). That rule derives from the fact that classifications based on alienage as the distinguishing characteristic, like those based upon color, race or national origin "are inherently suspect . . . . Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). *Accord*, *Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973). A state which incorporates a suspect classification into its laws "bears a heavy burden of justification." *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964); *In re Griffiths*, 413 U.S. 717, 721 (1973).[3]

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[3] The fact that New York's statutory classification is between citizens and those resident aliens able and willing to become American citizens on the one hand, and resident aliens not so willing on the other, is not constitutionally significant. In the case of *Takahaski* v. *Fish & Game Commission*, 334 U.S. 410 (1948), the division was between citizens and resident aliens eligible for United States citizenship, and ineligible resident aliens. That statutory distinction closely resembles the current case, and *Takahaski* clearly holds that kind of statutory discrimination invidious. Thus, the fact that the classification found in § 661(3) is not exactly between alien and citizen cannot be used as a mitigating shield to justify the use of a less than stringent constitutional analysis.

In four recent cases this Court considered classifications based on an individual's status as an alien, and in each case it struck down the state statute or rule involved for failure to meet the compelling state interest test.[4] Two lower courts have considered classifications similar to the one herein at issue and in both cases the statute has been struck down as unconstitutional.[5] In two recent decisions, the United States District Court for the Southern District of New York has declared unconstitutional other New York State statutes which discriminate against aliens.[6]

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[4] *Graham* v. *Richardson, supra* (denial of welfare benefits to aliens); *Sugarman* v. *Dougall, supra* (New York statute barring aliens from holding positions in the state competitive civil service system); *In re Griffiths, supra* (aliens denied admission to bar); *Examining Board* v. *Flores de Otero, supra* (Puerto Rican statute limiting the practice of engineering to United States citizens). *Accord, Miranda* v. *Nelson,* 351 F. Supp. 735 (D. Ariz. 1972) (three-judge court), *aff'd,* 413 U.S. 902 (1973) (statute and state constitutional provision barring aliens from public employment, including public educational institutions). *See also Truax* v. *Raich,* 239 U.S. 32 (1915) and *Takahaski* v. *Fish & Game Commission, supra* (wherein the Court invalidated state laws limiting the employment opportunities of aliens). *Cf. Hampton* v. *Mow Sun Wong,* —— U.S. ——, 96 S. Ct. 1895, 48 L.Ed.2d 495 (1976).

[5] *Chapman* v. *Gerard,* 456 F.2d 577 (3d Cir. 1972) (aliens barred from participation in Virgin Islands territorial scholarship fund); and *Jagnandan* v. *Giles,* 379 F. Supp. 1178 (N.D. Miss. 1974) (three-judge court) (state statute classifying aliens as non-residents for the purpose of charging higher tuition and fees to attend state supported institutions of higher education).

[6] *Surmeli* v. *New York,* 412 F. Supp. 394 (S.D.N.Y. 1976) (practice of medicine limited to citizens and resident aliens who become citizens within ten years of licensure); *Norwick* v. *Nyquist,* —— F. Supp. —— (74 Civ. 2798; July 20, 1976) (three-judge court) (aliens precluded from teaching in New York public schools). *Contra, Foley* v. *Connelie,* —— F. Supp. —— (75 Civ. 4548; July 9, 1976) (S.D.N.Y.) (three-judge court) (upholding by a 2-1 vote the constitutionality of a New York statute excluding aliens from employment as New York State police officers; Circuit Judge Mansfield filed a strong dissent).

2. Does New York's exclusion of aliens from all forms of assistance for higher education serve a compelling state interest? The district court concluded that appellants "failed to meet this burden . . . . [T]he State has not demonstrated a compelling interest justifying its discriminatory classification." (J.S. 17a, 18a; 406 F. Supp. at 1236.) We submit that that holding is clearly correct and should be affirmed.

In *Jagnandan* v. *Giles, supra,* a three-judge district court voided a Mississippi statute which classified all aliens as non-residents for state university tuition. *Jagnandan* is particularly instructive in that Mississippi had enacted a residency requirement for students seeking to qualify for the benefits of resident tuition rates. However, resident aliens, no matter how long they lived in Mississippi, could never qualify so long as they refused to become citizens. Here New York also has a residency requirement which the student must satisfy prior to receiving financial assistance. Education Law § 661(5). However, the resident alien is not allowed to receive educational assistance funds even after he establishes his residence in New York State in conformity with § 661(5) so long as he refuses to seek naturalization as an American citizen. As the Mississippi court put it, such a statutory scheme "on its face, creates an invidious discrimination and offends the Equal Protection Clause." 379 F. Supp. at 1186.

Neither reason appellants have advanced (J.S. 7, 10) supports the constitutionality of § 661(3).

(a) The "special public interest" doctrine, which held that a state government was justified in giving preference to citizens in the distribution of scarce economic resources —*see Crane* v. *New York,* 239 U.S. 195 (1915)—has been specifically rejected as a basis for upholding classifications based on alienage. *Graham* v. *Richardson, supra,* 403 U.S. at 375. There "can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis

with the residents of the State." *Id.* at 376. *Accord, Sugarman* v. *Dougall, supra,* 413 U.S. at 644-45.

(b) The appellants argue that § 661(3) is designed to "enhance" the "political community by increasing the educational level of the electorate . . . and by providing inducements to membership." (J.S. 10) The court below concluded that this justification would probably not even survive "the rational relationship test." (J.S. 17a; 406 F. Supp. at 1236.)

There is no requirement in New York's financial aid programs that any citizen-student who receives assistance must remain in New York and participate, via at least becoming a registered voter, in the "political community." Appellee and his family have lived in New York for twelve years and have contributed directly and indirectly to the well-being of the community in which they reside. Nonetheless, appellee has been excluded from receiving any form of educational assistance. On the other hand, an American citizen who may have lived elsewhere all of his life and who, therefore, together with his family, has contributed much less to the well-being of the community, is entitled to the full panoply of assistance after only approximately nine months residence in the state. Education Law § 661(5). Indeed, while appellee presently intends to continue to reside in New York after graduation, the citizen may, and is in fact free to, leave New York after the receipt of thousands of dollars of educational assistance. The appellee will continue to contribute to the well-being of the state and will use within the state the knowledge and skills acquired in college; the citizen may well leave New York after graduation and take with him the benefits derived from the funds received and never make any contribution to the community.

The foregoing result is simply not constitutionally permissible under the compelling state interest standard (and probably not even under the rational relationship

standard). *See Sugarman* v. *Dougall, supra,* 413 U.S. at 645-46;[7] *Chapman* v. *Gerard, supra,* 456 F.2d at 578-79. Section 661(3) is simply not structured to precisely achieve its supposed purpose. Because a classification subject to strict judicial scrutiny fails to satisfy that test if it is "insufficiently 'tailored' to achieve the articulated state goal." *Dunn* v. *Blumstein,* 405 U.S. 330, 357 (1972), the court below correctly determined that § 661(3) must be declared unconstitutional as violative of the equal protection clause of the Fourteenth Amendment.

3. Although not discussed in the opinion below, § 661(3) also violates the due process clause of the Fourteenth Amendment and the supremacy clause.

(a) Laws erecting irrefutable presumptions have long been disfavored as conflicting with the due process clause. Recently such laws have been struck down by this Court as contrary to due process requirements.[8] The teaching of those cases is that the use of an incontrovertible presumption to work an automatic exclusion from a right must be rejected "when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." *Vlandis* v. *Kline, supra* at 452.

In the instant case New York has, by § 661(3), precluded all non-citizens who are not willing to become citizens from receiving educational assistance. This broadly defined exclusion leaves no scope for individual exceptions, so its

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[7] *See also* the district court opinion under review in *Sugarman,* 339 F. Supp. 906, 909 (S.D.N.Y. 1971) (three-judge court).

[8] *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974) (presumption that pregnant women were incapacitated from teaching); *Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973) (denial of food stamps eligibility on basis of irrebuttable presumptions of lack of need); *Vlandis* v. *Kline,* 412 U.S. 441 (1973) (irrebuttable presumption of student nonresidency); *Stanley* v. *Illinois,* 405 U.S. 645 (1972) (irrebuttable presumption preventing unwed father's custody of child).

congruence with the facts must be virtually perfect to meet the rational relationship necessary under the due process clause to sustain the legislation.

We submit that whatever factual assumptions may be at the heart of § 661(3), purporting to justify its exclusion of aliens from educational assistance—among them that citizens are less mobile, more apt to stay in New York and participate in the political life of the community, more likely to enrich the social and economic communities or to pay a fair share of taxes—resident aliens and citizens in fact exist whose lives run counter to the factual assumptions. A prime example is Alan Rabinovitch and the members of his family.

Even assuming, *arguendo,* that the statutory generalizations are predominantly right, that is not to say that they are not sometimes incorrect. Some resident aliens are undoubtedly exemplars of good citizenship; some are considerably less transient than citizens only temporarily in New York; and some resident aliens have contributed far more to the work force and tax base of New York than many citizens. On the other hand, a large number of citizens eschew the political life of the community. In light of the lack of congruence between the statutory assumptions and the actual factual pattern, the automatic exclusion of § 661(3) sweeps too broadly. Legislation using alienage as the distinguishing characteristic must be artfully and narrowly drawn so as not to work an indiscriminate and overly broad denial of basic rights. The existence of non-conforming individuals in the face of the statute's conclusive assumptions makes it clear that its language is too loose and results in an unwarranted deprivation of due process of law.[9]

[9] The due process clause has been the basis for invalidating irrebutable presumptions in the field of education. *See Vlandis* v. *Kline, supra; Jagnandan* v. *Giles, supra,* 379 F. Supp. at 1187; *Moreno* v. *University of Maryland,* —— F. Supp. ——, 45 U.S.L.W. 2056 (Civ. No. M-75-691; July 13, 1976) (D. Md.).

(b) Recently this Court reiterated the constitutional principle established in *Traux* v. *Raich, supra,* and *Takahaski* v. *Fish & Game Commission, supra,* that "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *DeCanas* v. *Bica,* —— U.S. ——, 96 S. Ct. 933, 938 n. 6, 47 L.Ed.2d 43, 50 n. 6 (1976). Statutes which discriminate against lawfully admitted aliens deter them from entering and residing in the state. The imposition of such burdens and the resulting deterrence of residency are "inconsistent with federal policy . . . . Since such laws encroach upon exclusive federal power, they are constitutionally impermissible." *Graham* v. *Richardson, supra,* 403 U.S. at 380.

Congress has specifically legislated as to the legal status of aliens vis-a-vis the laws of the several states. In 42 U.S.C. § 1981 Congress granted to aliens the full and equal benefit of all state laws "as is enjoyed by white citizens." Accordingly, this Court has held that "aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens, under non-discriminatory laws.' *Takahashi,* 334 U.S. at 420." *Graham* v. *Richardson, supra,* at 378.

Section 661(3) is clearly in conflict with 42 U.S.C. § 1981 in that it denies to aliens the equal benefit of the laws of New York enjoyed by citizens in the matter of financial aid for higher education. Since § 661(3) conflicts with federal law in an area in which the latter is supreme and exclusive, the supremacy clause mandates a ruling that New York's statute is unconstitutional.[10]

[10] To the extent that New York seeks to induce resident aliens into citizenship in order to enhance the "national political community" (J.S. 10), it is engaged in an endeavor beyond its concern and powers. Under the Constitution only the federal government, acting through the Congress or the President, may enforce measures to enhance the national political community. *Cf. Hampton* v. *Mow Sun Wong, supra.*

Conclusion

For the foregoing reasons, the judgment of the three-judge district court should be affirmed insofar as it declared § 661(3) of the New York Education Law unconstitutional.

September 8, 1976.

Respectfully submitted,

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